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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

In the Supreme Court of the United States

October Term, 1997

Jack Einheber - Petitioner (Pro Se)

v.

The Public Employment Relations Board,
State of California - Respondent

University of California at Berkeley -
Real Party in Interest

on petition For Writ Of Certiorari
To The Supreme Court of State of California

PETITION FOR WRIT OF CERTIORARI

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1988

QUESTIONS PRESENTED

1) Does a medically documented, emergency disabling mishap , which is beyond a pro se litigant's control, and which effectively makes it physically impossible or impractical for the litigant to comply with statutory time limitations, warrant tolling of that statue?

2) In the case of a person disabled within the meaning of the Americans With Disabilities Act, does denial of tolling of the statute of limitations in the circumstances described above, countermand public policy, or the spirit of public policy which favors accommodation of disabilities?

3) Does judicial denial of excuse of timeliness default by virtue of impossibility/impracticability due to medical circumstances beyond a litigant's control countermand existent statutory and decisional law favoring such excuse, especially when the result is injustice?

4) Does such denial countermand federal and California policy holding pro se litigants to less strict standards, and decisional law favoring trials of merit rather than automatic disqualification?

5) When, as in this case, the respondent and the California State Court of Appeal, both failed to comply with California statutory procedural requirements in disqualifying a petition as untimely, is the disqualification nullified?

6) Should existent conflicting California statutes regarding timeliness default be harmonized to preclude confusion with regard to the appeal of timeliness default decisions?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the California Supreme Court appears at Appendix B to the petition and is unpublished.

The opinion of the Court of Appeal of the First Appellate District Division Three appears at Appendix A and is unpublished.

JURISDICTION

The date on which the California Supreme Court decided my case was July 30, 1997. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a)

STATUTORY PROVISIONS INVOLVED

1) Americans With Disabilities Act of 1992 -- general principles and intent.

2) California Code of Civ. Proc. 418.10, entitled:

> "Notice of motion to quash service or to stay or dismiss action; Petition for writ of mandate and responsive pleading; Default and general appearance"

Allows granting relief from timeliness default "...on or before the last day to plead or within any further time that the court may for good cause allow,...."

3) California Code Of Civ. Proc. 473 provides as follows:

> "The Court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect."

4) California Code of Civ. Proc. 583 specifies that the real test for timeliness disqualification in arbitration is whether or not there has been

> "reasonable diligence" and that "mechanical application" would result in injustice because of the impossibility/ impracticability of timely filing under the circumstances.

5) Calif. Code of Civ. Proc. 1013 specifies requirements of different methods of service upon another party. It is entitled

> "Manner and completion of service by mail, Express Mail or facsimile transmission"

6) Code of Civ. Proc. 405.39 states:

> "The petition for writ of mandate shall be filed and served within 20 days service of the written notice of the order by the court or any party."

7) Calif. Code of Civ. Proc. 415.40 provides that:

> "A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and complaint to the person to be served by any form of air mail requiring a return receipt."

8) Calif. Code of Civ. Proc. 417.20 further specifies that:

> "(a) If served in a manner specified in a statute of this state, as prescribed by Section 417.10 [Proof of service on person in state], and if service is made by mail pursuant to Section 415.40, proof of service shall include evidence satisfactory to the court establishing actual delivery [emphasis added] to the person to be served, by a signed return receipt or other evidence;...."

9) Code of Civ. Proc. 664.5 provides:

> "(a) In any contested action or special proceeding in a superior court ... the party submitting an order or judgment for entry shall prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding...."

> "(c) For purposes of this section, "judgment"includes any judgment, decree or signed order from which an appeal lies."

10) California Government Codes 3520(c), 3542(c) and 3564(c) which read identically and prescribe the procedure for appealing the California Public Employment Relations Board's final decisions.

11) California Rules of Court, Rule 59 dictates the rules for filing and service of the index to the PERB certified record in reference to California Government Codes 3520(c), 3542(c), and 3564(c).

12) Equitable Principles.

STATEMENT OF THE CASE

The subject of the instant petition relates to settlement of important issues of law and uniformity of statutory decisions, which are a continuing matter of public interest and likely to recur. The California Supreme Court denied the Petitioner's timely petition for review of the pro se Petitioner's petition for writ of extraordinary relief (writ of review), which in the opinion of California Court of Appeal had been untimely. The latter petition could not have been timely filed due to a life threatening medical emergency which delayed the Petitioner's scheduled return to the San Francisco Bay Area and delayed his receipt of the Public Employment Relations Board's, hereinafter PERB, Order. The result of the emergency was extended medical treatment in Europe relative to the petitioner's terminal orphan illness, for which he is now on a liver transplant list. Petitioner suffers from primary sclerosing cholangitis, a rare, non-communicable, idiopathic, terminal, orphan illness, which requires liver transplantation for continued survival.

The filings in the original matter before the PERB, were closed November 8, 1997. (Exhibit A in the record below). PERB issued its decision on April 10, 1997, (Exhibit B in the record below) The lengthy hiatus from the November 8, 1996 cessation of filings in the matter until April 10, 1997 decision, made the latter all the more unexpected, creating an element of surprise in what was a highly stressful time. As a pro se litigant with substantial medical expenses the Petitioner does not maintain an office or office staff. Rather he works from home and rents equipment at commercial desktop publishing estblishments.

Although he had originally been scheduled to return to the San Francisco Bay Area on April 12, 1997, (Exhibit D1 in the record below- - A copy of the Petitioner's original temporary change

of address form as received from the Berkeley Post Office June 5, 1997), the Petitioner was at the time in Europe where on April 11, 1997 he began receiving emergency and follow-up medical treatment which extended through April 23, 1997. Upon his return to the East Coast of the United States at the end of April, he continued to receive treatment. The medical condition included accidental burns which were nearly of the third degree. (Exhibit C of the record below - pertinent medical records)

After the Petitioner's return to the United States, he was bed ridden on the East Coast with home care until May 6, 1997. The Petitioner received no mail from early April until May 8, 1997, when by special arrangement with the Berkeley Post Office he received a large box of forwarded mail. That day was the first following his return from Europe, on which his family gave him any mail addressed to him.

(As a matter of practical standard operating procedure, the Petitioner's original order to have his mail forwarded was scheduled to cease several days earlier than April 12, 1997 so that mail delivery to his California home, had he returned as originally scheduled, would have resumed beginning April 12, 1997. For unknown reasons, although PERB's decision mailed to the Petitioner's home on April 10, 1997 was marked for return April 14, 1997 [Exhibit D of the record below], it was included in the forwarded large mailing the Petitioner received on the East Coast May 8, 1997.)

Having no access to a law library on the East Coast, (unlike the access he has in the Bay Area to the Alameda County Law Library), and still suffering from the effects of the illness, the Petitioner immediately wrote to PERB on May 8, 1997. He asked PERB for reconsideration and his recourse. PERB responded on May 16, 1997. (Exhibit F of the record below) Petitioner received this response

on the evening of May 23, 1997, shortly after his May 22, 1997 return to the Bay Area (Exhibit G of the record below), when he retrieved his mail that was held for him at the Berkeley Post Office. Therefore, in light of circumstance there was no mail forwarding order to Europe. Thus, this was a case of all around unfortunate timing.

The essence of the Petitioner's objection to the PERB decision is that PERB, instead of considering his appeal on its merits, unfairly disqualified his appeal based on an invalid timeliness issue, unsupported by substantial evidence. The Administrative Law Judge, hereinafter ALJ, who evaluated the Request for Reconsideration, had told the Petitioner there was no timeliness issue. The Petitioner contacted the ALJ after long term, but necessarily delayed, pivotal discovery regarding discrimination, some of which occurred, and some of which was only available shortly prior to the Petitioner's recontact of the ALJ. The ALJ reviewed the case based on its merits and the Petitioner's appeal to the PERB Board was based upon merits and facts of the case. Given the ALJ's actions, the Appellant had no reason to expect a timeliness issue.

In a phone call to PERB on May 30, 1997, PERB's Mr. Bob Thompson directed the Petitioner to the proper sources for appealing the PERB Board's decision. On June 5, 1997, the petitioner filed a writ for extraordinary relief with California State Court of Appeal per California Government Code 3564(c).

In its June 12, 1997 decision rejecting the Petitioner's argument that his petition for extraordinary relief from timeliness disqualification should be appropriately granted, the California Court of Appeal made no mention of the above specified extenuating circumstances nor of the California code sections specified both in the Statutory Provisions Section above and in the Petitioner's petition for extraordinary relief before the California Court of Appeal.

On July 30, 1997, the California Supreme Court denied the Petitioner's petition to review the Court of Appeal's decision.

REASONS FOR GRANTING THE PETITION

1) Under Code Civ. Proc. 418.10, per Cornell University Medical College v. Superior Court "...a reviewing court may grant ... relief on a proper showing of excusable inadvertence." California Code of Civil Procedure 418.10 also includes the notation that petition can be accepted "...within any further time that the court may for good cause allow." (Cornell University Medical College v. Superior Court 38 C. A. 3d 311; 113 Cal Rptr 291)

2) Similarly in Quattrone v. Superior Court such relief may be offered "... under equitable principles and under Code Civ. Proc. No. 473, permitting relief from default resulting from inadvertence or excusable neglect...". (Quattrone v. Superior Court 44 C. A. 3d 296; 118 Cal Rptr 548).

3) In Preston v. Kaiser Foundation Hospitals, the California Supreme Court found that "...though Code Civ. Proc. No. 583 provides a measuring rod for time limitations in arbitration proceedings, the real test is reasonable diligence."

In that case the Court went on to say: "However, it would be impossible to identify every situation in which a mechanical application of Code Civ. Proc. No. 583 would produce injustice, and thus the statute must be applied in light of all circumstances in the individual case, including the nature of the proceedings themselves. "(Preston v. Kaiser Foundation Hospitals 126 Cal App. 3d 402; 178 Cal Rptr 882)

Other cases support this fundamental concept. (Wilcox v. Ford 206

Cal.App.3d 1170; 254 Cal.Rptr. 138 [Dec. 1988]; Caldwell v. Methodist Hospital (1994, 2nd Dist) 24 Cal App 4th, 1521, 29 Cal Rptr 2d 894.)

4) In Moran v. Superior Court, the Court ruled that implied exceptions to Code. Civ. Proc. 583 exist in situations where it would be impossible, impractical or futile to proceed. When reasonable diligence has been exercised, the goals of the statute have been met.

Although, there are potentially even more extenuating circumstances, such as for example a pro se litigant who falls into a prolonged coma, the Petitioner prays that in this case the Court will recognize the impossible nature of his circumstances and deem, that under those circumstances, the Appellant has exercised reasonable diligence. (Moran v. Superior Court 35 Cal. 3d 229; 197 Cal. Rptr. 546, 673 P. 2d 216 (Dec. 1983); Iott v. Franklin [1988,2nd Dist] 206 Cal App 3d 521, 253 Cal Rptr 635; Campanella v. Takaoka 160 Cal App 3d 504, 206 Cal Rptr 745 [Sept,1984]; Hoffman v. State of Cal 171 Cal App 3d 1100; 217 Cal Rptr, 867)

5) In Westinghouse v. Superior Court, again in relation to Code Civ. Proc. 583, the Court ruled that the 5 year statute was tolled by outstanding substantial discovery. (Westinghouse v. Superior Court 143 Cal App. 3d 95; 191 Cal Rptr 549)

6) California courts have consistently held pro se litigant to less strict standards and this is in line with federal policy as expressed in Haines v. Kerner: "The allegations of a pro se litigant are held to less stringent standards than the formal pleadings drafted by counsel." The Court of Appeal made no note of any such adjustment in the instant case. (Haines v. Kerner 404 US 519 92S Ct 594 30 L. Ed.22 652)

7) Case law has clearly favored trials of merit rather through automatic disqualification, sans examination of merit. (Lorenz v. Commercial Acceptance Ins. Co. [1995, 6th Dist) 40 Cal App 4th 981, 47 Cal Rptr 2d 362; Moran v. Superior Court 35 Cal. 3d 229; 197 Cal. Rptr. 546, 673 P. 2d 216 (Dec. 1983).

8) If there is a question of service which is practical in a real sense, then the timing of Appellant's receipt of the PERB Order under the circumstances may logically vacate the Appellate Court's decision. If so then that Court's jurisdiction may be void. (Milrot v. Stamper Medical Corp. [App. 2 Dist, 1996] 51 Cal Rptr 2d 424, 44 Cal App 4th 182); Batte v. Bundy [1958, 2nd Dist] 165 Cal App 2d 527, 332 P2d 439)

In the case of the most incapacitating disability, death, even a deceased represented client's case's limitations have been tolled. (Herring v. Peterson [1981] 116 CA 3d 608, 172 Cal Rptr 240); Pham v. Wagner Litho machinery Co. [1985, 4th Dist] 172 Cal App 3d 966, 218 Cal Rptr 476)

9) Per Rappleyea v. Campbell it appears at least two of three prongs (and possibly all 3) for equitable relief have been met:

1) satisfactory excuse for failing to timely answer in the original action;

2) diligent attempt to set aside the default once discovered

3) and possibly a sufficiently meritorious defense or its equivalent

(Rappleyea v. Campbell 8 Cal 4th 975; 35 Cal Rptr. 2d 669, 884 P. 2d 126 [Dec., 1994]

10) The most fundamental long standing guiding principles were not mentioned in the Court of Appeal's decision: Code of Civ. Proc. 473 need be considered for sound discretion in relief cases, grounded in principles of justice and fair dealing. (Elms v Elms 72 Cal App 2d 508, 513, 519 [164 P.2d 936]) Denials of timeliness relief, on the other hand, are more closely scrutinized by reviewing courts than granting such relief. (Hansen v. Bernstein 110 C.A. 2d 170; 242 P.2d 368) Judicial operations should subserve and not impede or defeat the ends of substantial justice. (Rivercourt Co. Ltd. v. Dyna-Tel, Inc. [1996, 1st Dist) 41 Cal App 4th 1477; 49 Cal Rptr 2d 279) And, of course, last but not least all courts have the power to correct their records to make them "speak the truth". (Olivera v. Grace [1942] 122 P.2d 564, 19 C.2d 570, 140 A.L.R. 1328)

The cardinal issue is whether the over-riding principle governing consideration of timeliness is truly justice in view of circumstance and as reflected in some statutory decisions, or is the over-riding principle the one found in other statutory decisions -automatic, non-analytical application of limitation per statute, absent regard for circumstance resulting in physical impossibility or impracticability or futility.

The latter approach createsa double standard in Californiawherein the Court of Appeal almost unifromly permits delay of brief submission when notified in advance of medical circumstances, vacations etc. But in this case wherein extreme medical circumstance prevented timely receipt of notification and consequent timely submission, there is no accommodation. This action and possibly conflicting policy amounts to lip service rather true, or sincere accommodation.

Rather the Court quoted only the San Mateo Federation of Teachers v. Public Employment Relations Bd. Case, possibly relative to

Appellant's discussing the spirit of Code of Civ. Proc. 1013. (San Mateo Federation of Teachers v. Public Employment Relations Bd. (1994) 28 Cal. App. 4th 150, 155-56.).

While San Mateo Federation of Teachers apparently limits itself to concluding that the term "issuance" as written in Government Code 3542 does not encompass "service" as required by Code of Civ. Proc. 1013, Supreme Court and Court of Appeal Rule 59 refers to Government Codes 3520(c), 3542(c) and 3564(c), stating" ...the board shall file the certified record of the proceedings and shall simultaneously file and serve on all parties an index to the certified record." "...Within 30 days after service of the index to the certified record, the petitioner shall serve and file a brief in support of the petition." In this case, in light of out of state location for the Petitioner, what constitutes service?

Furthermore, since Petitioner never received an index from PERB, has the 30 day statute even begun? If not, did the Court of Appeal have jurisdiction to decide this matter? If not, is that court's ruling consequently void?

Is PERB's signed order a "judgment" per Code of Civ. Proc. 664.5, and therefore possibly subject to a motion to set it aside possible up to 180 period subsequent to its issuance?

In the case of out of town location, of whose possibility PERB was possibly aware (Exhibit 1 in the record below), and in light of its knowledge of pro se Appellant's serious chronic medical condition of which PERB has numerous times been made aware, was it incumbent on PERB to take some extra measure to assure service, possibly analogous to those in the case of out of states summons' as specified in Code of Civ. Proc. 415.40 and Code of Civ. Proc. 417.20, wherein service via signed delivery is mandatory

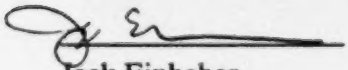
Another issue is harmonization of statute, which is currently apparently contradictory. Whereas Code of Civ. Proc. 418.10 appears to permit petition for relief subsequent to statute deadline and "...within any further time that the court may for good cause allow.", Code of Civ. Proc. 405.39 permits such petition only prior to deadline, and in apparent conflict with decisional law.?

Petitioner looks to the U.S. Supreme Court to provide national direction in public policy related to medical exigency and for a resolution to the contradictory messages in the statutes and case law. It would appear that application of basic principles of logic with respect to evaluating circumstances of real life situations should provide the guiding beacon, and that the spirit of the law and current trends in public policy which aim at accommodating difficult medical circumstances, (such as the Americans With Disabilities Act and the California Family Care and Leave Statute) should prevail over automatic deadlines. The latter course, although expedient, convenient and tempting in a still overloaded judicial system, is blind to humane values, so intrinsically woven into the fabric of our laws. The fundamental spirit and purpose of the law need prevail.

CONCLUSION

Petitioner prays that a writ of certiorari will be granted.

Respectfully submitted



Jack Einheber

October 28, 1997 Date

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION THREE

FILED COURT OF APPEAL - FIRST APP. DIST; JUN 12, 1997
RON D. BARROW, CLERK; By _____
DEPUTY

JACK EINHEBER, Petitioner, A078695

vs.

THE PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent;
PERB Case no. 949a-H

UNIVERSITY OF CALIFORNIA, BERKELEY LABOR RELATIONS DEPARTMENT, Real Party in Interest
_____/

BY THE COURT:

The petition for writ of review is denied as untimely (San Mateo Federation of Teachers v. Public Employment Relations Bd. (1994) 28 Cal. App. 4th 150, 155-6.) (Phelan, P.J., Corrigan, J. and Parrilli, J. participated in the decision.)

Dated JUN 12, 1997

Signed: Phelan P. J.

APPENDIX B

First Appellate District, Division Three, No. A078695

S062360

IN THE SUPREME COURT OF CALIFORNIA

JACK EINHEBER, Petitioner

v. THE PUBLIC EMPLOYMENT RELATIONS APPEALS BOARD, Respondent

UNIVERSITY OF CALIFORNIA BERKELEY LABOR RELATIONS, Real Party in Interest

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SUPREME COURT FILED JUL 30, 1997
Robert Wandruff Clerk
RH

DEPUTY

Petition for Review is DENIED

George

Chief Justice